

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARLA LOUISE MCDONALD,

Defendant-Appellant.

UNPUBLISHED
December 9, 2003

No. 241404
Ogemaw Circuit Court
LC No. 01-001786-FH

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of negligent homicide, MCL 750.324. The trial court sentenced defendant to 90 days in jail and 36 months' probation, and to pay a fine, costs, and restitution. We affirm.

On January 6, 2001, when defendant maneuvered her automobile while traveling approximately seventy miles per hour to pass a snowplow/salt truck, defendant's automobile struck a police cruiser that had been parked on the median side of the southbound lanes of I-75 in Ogemaw County. The police cruiser was parked there while a police officer investigated a previous accident. After striking the rear of the police cruiser, defendant's automobile rolled over the cruiser and crushed the victim between defendant's automobile and the victim's own vehicle. The victim sustained injuries resulting in her death.

On appeal, defendant first argues that the trial court erred in denying her motion for directed verdict under MCR 6.419 on the basis of insufficient evidence. We disagree. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). To prove negligent homicide, the prosecution must show that (1) the defendant was operating a motor vehicle, (2) the defendant was operating the vehicle at an unreasonable speed or in a negligent manner, (3) the defendant's negligence was a substantial cause of an accident resulting in injuries to the victim, and (4) those injuries caused the victim's

death. See MCL 750.324;¹ *People v Tims*, 449 Mich 83, 95, 99, 103-104; 534 NW2d 675 (1995); *People v Paulen*, 327 Mich 94, 99; 41 NW2d 488 (1950); CJI2d 16.14.

Here, defendant contends that the evidence at trial failed to support the third element—defendant argues that her negligence, if any, was not a substantial cause of the accident that resulted in the victim’s death. According to defendant, the positioning of the police cruiser impeded the driving lane, making the accident unavoidable, and thus defendant was entitled to directed verdict.

Contrary to defendant’s argument, we conclude that, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented to support a rational trier of fact’s determination that defendant’s negligence was a substantial cause of the accident. Although defendant insists that the evidence indicates that due to the snow removal from the roadway creating snow banks, the location of the parked police cruiser could not have been entirely on the shoulder of the road, testimony from the police officer whose cruiser was struck indicates that none of her parked cruiser extended into the through lane. And another witness, who was driving behind defendant on the roadway, testified that the cruiser was at or close to the yellow line, but he could not tell if the rear of the cruiser extended out into the lane. With regard to the positioning of the cruiser, the snowplow/salt truck driver testified that there was “plenty of room” for a car to go through. To the extent that defendant relies on *Tims*, *supra* at 102, which states that “[t]he exacting rules of criminal causation dictate that a driver is not in fact or law the cause of the deceased’s death unless the proofs are such that a jury could find beyond a reasonable doubt that the defendant could have avoided the accident,” her argument that the collision was unavoidable rests on the premise that the police cruiser impeded the traveled portion of the roadway, which, given the evidence presented, was not a necessary conclusion. Although defendant claims that there is “no credible evidence” supporting defendant’s conviction on the prosecution’s theory that her automobile left the traveled portion of the roadway to strike the parked cruiser, sufficient evidence to support this theory was presented, and this Court will not interfere with the jury’s role of determining the weight of evidence or the credibility of witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997) (“[I]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.”); *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Because the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of negligent

¹ MCL 750.324 provides:

Any person who, by the operation of any vehicle upon any highway or upon any other property, public or private, at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than \$2,000.00, or by both such fine and imprisonment.

homicide were proved beyond a reasonable doubt, we need not reach defendant's argument concerning the emergency response doctrine, which is premised on the parked cruiser impeding the lane of travel. In sum, defendant was not entitled to a directed verdict.

Defendant next argues that the trial court erred in denying defendant's motion for a new trial under MCR 6.431 on the basis of newly discovered evidence. We disagree. Whether to grant new trial is in the trial court's discretion and its decision will not be reversed absent an abuse of that discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002). "[A]n abuse of discretion exists only if the result was so violative of fact and logic that it indicates either a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Libbett, supra*.

To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *Cress, supra* at 692; *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

In the present case, defendant sought a new trial on the basis of the snowplow/salt truck driver's testimony in a deposition in a civil action against defendant taken after the verdict in the criminal trial. At trial, that witness testified that the police cruiser was parked "straight with the road," i.e., parallel with the roadway, not at an angle to it, but also agreed that the cruiser may look like it is at an angle when on a curve in the road. At the deposition, that witness testified that the cruiser was parked "parallel with the lane," that he was "pretty positive it was [parallel]," and that he did not believe that the cruiser was angled at all. However, with further questioning, he indicated he was doing his job and "I wasn't really paying attention to it." When further questioned whether the cruiser was parked parallel or at an angle, he answered "I guess I don't know." When asked if he knew if any part of the cruiser was beyond the fog line into the left through lane, he answered "I really don't know."

At the hearing on the motion, the trial court concluded that the difference in the testimony was not significant, would not result in a different jury verdict on retrial, and that with reasonable diligence it could have been produced at trial, and therefore denied defendant's motion for new trial on this basis. Like the trial court, we believe that the deposition testimony can hardly be considered a "true recanting." Rather, the deposition testimony merely revealed the witness' degree of certainty with regard to how the police cruiser was positioned. In light of the other witnesses' testimony concerning this matter, whether the cruiser was parked parallel or at an angle does not necessarily mean that it impeded the roadway, and it is not probable that a different result would occur on retrial because of the deposition testimony. Moreover, had the witness been pressed at trial, this testimony may have been produced then. In light of the record before us, we cannot say that the trial court abused its discretion in determining that the snowplow/salt truck driver's deposition testimony was not newly discovered evidence warranting a new trial.

Next, defendant argues that the trial court erred in failing to find that defendant's "due process rights had been violated based on police conduct ensnaring [defendant] without regard to causation." Specifically, defendant argues that she was denied a fair trial as a result of the police

investigation process. Defendant faults the investigating officer for failing to timely communicate to the accident reconstructionist defendant's and her daughter's comments concerning the police cruiser being parked in the traveled portion of the roadway, for failing to determine the pre-impact position of the cruiser, especially in light of the fact that other people had been in the cruiser before the collision, and for failing to determine what ability, if any, defendant had to avoid the cruiser. Whether a defendant's right to due process was violated is a question of law that we review de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

Due process does not require the police to seek and find exculpatory evidence. See *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975). Therefore, the police did not owe defendant a duty to investigate this case more thoroughly than they did. Further, because the investigating officer based his decisions regarding the extent of the investigation on his understanding of the law, it was a legitimate police investigative determination. See *Stephens, supra* (failure to dust a weapon for fingerprints not tantamount to suppression or withholding of evidence to the detriment of the defendant in violation of due process rights). Defendant has failed to demonstrate any bad faith actions by the investigating officer. Moreover, defendant had the opportunity to cross-examine the investigating officer, thereby demonstrating to the jury the allegedly deficient degree of investigation. To the extent that defendant relies on entrapment cases in support of her argument, we note, without regard to whether analogizing to such cases is even acceptable, that the investigator's conduct here falls short of the standard for finding entrapment, i.e., the conduct was not so reprehensible that civilized society simply will not tolerate it. See *People v Williams*, 196 Mich App 656, 661-663; 493 NW2d 507 (1992); *People v Fabiano*, 192 Mich App 523, 531-532; 482 NW2d 467 (1992). In sum, we are satisfied that defendant's due process rights were not violated on the basis of police conduct.

Finally, defendant argues that the trial court erred in denying defendant's motion for a new trial under MCR 6.431. Defendant, citing *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998), claims that the testimony of the officer whose cruiser was struck "contradicts indisputable physical facts and laws" and that the only logical inference from the resultant position of the cruiser after impact in light of the curvature of the road and the direction of impact is that the cruiser was parked in the position supported by the testimony of certain witnesses. Defendant concludes that the evidence can support only the conclusion that the cruiser obstructed defendant's lane of travel, causing a sudden and unexpected emergency for which defendant had no time to react. A trial court's decision whether to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Having reviewed the record, we are satisfied that the trial court did not abuse its discretion in denying defendant's motion for a new trial. Like the trial court, we believe that the evidence presented at trial does not command only one conclusion, nor does the physical evidence completely undermine the testimony of certain witnesses. "A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon, supra* at 627. "If the 'evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions,' the judge

may not disturb the jury findings although his judgment might incline him the other way.” *Id.* at 644 (citation omitted). Under the present circumstances, we find no abuse of discretion.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio